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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE MARION CIRCUIT COURT OF MARION COUNTY, INDIANA, and THE HONORABLE J. PATRICK ENDSLEY, AS JUDGE OF SAID COURT,

Petitioners,

vs.

STATE OF INDIANA ON THE RELATION OF THE PUBLIC SERVICE COMMISSION OF INDIANA, PUBLIC SERVICE COMPANY OF INDIANA, INC., ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the claimed deprivation of a federal constitutional right is properly before this Court when the petition fails to comply with Rule 23(f) of the Rules of this Court.

2. Whether the claimed deprivation of a federal constitutional right was timely and properly raised so as to give this Court jurisdiction to review the judgment of the Supreme Court of Indiana on certiorari when such claim was raised by petitioners for the first time in the Supreme Court of Indiana in their petition for rehearing after that court's decision on the merits and said petition was denied without an opinion.

3. Whether the judgment of the Supreme Court of Indiana sought to be reviewed has the effect of depriving plaintiffs in the Rushville case of any federal constitutional right or merely decides a question of state law.

STATEMENT OF THE CASE

The transaction in which respondent Public Service Company purchased the Rushville electric properties in 1968 is sufficiently described in the petition. In 1974, said respondent filed with respondent Public Service Commission of Indiana a petition for a general increase of its rates. Its proposed new schedules did not include any increase in the rates of the Rushville customers, but provided for continuance of the Rushville optional rates in accordance with the terms of the purchase contract. However, the Commission's order authorizing a rate increase stated, among other things:

> "Within the past ten years Petitioner has purchased certain municipal electric systems. Part of the agreement of purchase in each instance was that each customer receiving electric service from the municipal electric property at the date of the closing of the sale would have the option to elect to receive electric service from Petitioner either at a rate equivalent to the existing municipal rate or at the applicable standard rate of Petitioner so long as he continues to receive service at the same premises, but when service at the municipal rate is once discontinued at the request of the customer, such optional rate will not again be available to such customers or at such premises. These optional rates are on file with the Commission and Petitioner has not proposed to increase such rates. Rushville has objected to any increase. In Petitioner's last rate case the Commission did not order such optional rates increased, although recognizing it had authority to do so. The difference between what these optional rates produced in gross revenues in the test year and what the applicable proposed rates would have produced in the test year if applied to those customers under the optional rates, according to Petitioner's Witness Gimbel, was $250,000."

Finding No. 8 of said order states:

"With regard to Petitioner's agreements with certain municipal electric systems to freeze rates to certain customers, we find that to allow customers under these frozen rates to continue receiving service at rates considerably lower than customers receiving the same type of service is unreasonable and unjustly discriminatory and Petitioner's contract with these municipalities cannot be permitted to extend this unreasonable and unjustly discriminatory treatment in perpetuity. It would be unconscionable for us to permit 2,000 of Petitioner's 484,000 customers to continue to receive electric service at rates that are so low as to be patently unreasonable and unjustly discriminatory. Our Supreme Court has held that it is not possible for a utility by its contracts to take away, deprive or limit this Commission's statutory power to fix rates and charges. *Boone County REMC v. Pub. Serv. Com.*, 239 Ind. 525 (1959); *State ex rel. Pub. Serv. Com. v. Boone Cir. Court*, 236 Ind. 202 (1956); and *Pub. Serv. Com. v. Girton*, 189 Ind. 627 (1920). These optional rates should be withdrawn by Petitioner and the customers served under these optional rates should be served under applicable rate schedules to be filed by Petitioner pursuant to this order."

Rushville took an appeal from the Commission rate order pursuant to the provisions of IC 1971, 8-1-3-1, which provides in substance that any person, firm, association, corporation, etc., adversely affected by any final order of the Public Service Commission of Indiana may appeal to the Court of Appeals of Indiana for errors of law. The appeal is still pending.

Rushville and certain individuals purporting to represent a class of persons entitled to the rates specified in the purchase contract separately filed in the Marion Circuit Court of Marion County an action against the respondents herein in three counts charging, respectively, breach of contract, fraud, and violation of civil rights by abrogation and nullification of their contract rights without due process, taking their property rights without compensation, and impairing the obligation of their contract under color of statutory authority. Each count was expressly based upon the allegation that the order was invalid. The complaint alleged, among other things:

"That action and order by the commission was arbitrary, capricious and unlawful.

"The power company has acted, and will continue acting, to increase the rates of the Plaintiffs herein pursuant to the purported order, using the arbitrary, capricious and unlawful order as a pretext for repudiating its agreement.

* * *

"By reason of the above stated facts, the power company has breached and repudiated, and the commission has abrogated, the power company's agreement to maintain rates as part of its consideration and payment for the Rushville power plant, system and business. * * *"

* * *

"In issuing its sudden order without notice for the increase in the Rushville rates, the commission had full knowledge and fully understood that in so doing it was depriving Rushville of a vital part of the consideration promised it for the sale and transfer of its utility properties and business.

"And the commission also knew and understood that it was affording the power company an opportunity to escape its obligation to Rushville and the other Plaintiffs."

After unsuccessfully challenging jurisdiction of the subject matter in the Marion Circuit Court (Public Service by motion for summary judgment, Commission by motion to dismiss), respondents, as relators therein, instituted the proceeding in the Supreme Court of Indiana for a writ of prohibition resulting in the judgment sought to be reviewed.

Neither a copy of respondents' petition for the writ of prohibition nor a statement of the substance of any part thereof has been included in the petition for certiorari. That petition contains no allegations with respect to the substantive merits of the claim asserted by Rushville, et al., in the Marion Circuit Court, but alleges only that the latter court has no jurisdiction of the subject matter for the following reasons:

1. The foundation of plaintiffs' claim for relief in the Marion Circuit Court as alleged in each count of the complaint is that the rate order of the Public Service Commission was unlawful and invalid. Exclusive jurisdiction to pass on and determine the validity of an order of the Public Service Commission is lodged in the Court of Appeals of Indiana by IC 1971, 8-1-3-1, and Rule 4(C) of the Rules of Appellate Procedure of the Supreme Court of Indiana. Said Rule provides, in part: "The Court of Appeals shall have jurisdiction to * * * review final decisions of * * * the Public Service Commission of Indiana * * * as provided by statute for the Appellate Court and Court of Appeals."

2. Since an appeal from said order is pending in the Court of Appeals of Indiana, the possibility of conflicting determinations with respect to the validity of the order might arise if both the Court of Appeals and the Marion Circuit Court were permitted to proceed.

As the petition for certiorari indicates (p. 6), the petitioners herein filed in the proceeding in the Supreme Court of Indiana:

(1) a response to the petition prior to the granting of the temporary writ;

(2) a return to the order to show cause why the temporary writ should not be made permanent; and

(3) a petition for rehearing after the writ was made permanent.

Their petition here is silent as to the contents of either their response or their return. With respect to the petition it asserts merely (p. 6):

> "That Petition had pressed for a clarification of the opinion and decision in respect of their duration and scope."

Neither petitioners' response prior to the issuance of the temporary writ, nor their return to the order to show cause why said writ should not be made permanent asserted any claim of violation of any federal right, constitutional or otherwise. Their petition for rehearing included the following:

> "The opinion employs language that creates uncertainty—
>
> "'. . . The rule relied on by Relators is fully applicable here and the jurisdiction of the Court of Appeals must be held to be exclusive *at this time* so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts.' [Emphasis added] (Opinion page 3, lines 2-6)
>
> when placed alongside the words of the decision itself—
>
> "'The writ heretofore granted in temporary form *is now made permanent.*' [Emphasis added] (Opinion page 3, line 7)
>
> * * *
>
> "If the language quoted next above imports only a halt in the proceedings before the Respondents during the pendency of the litigation in the Court of Appeals, then the opinion and decision should be modified so that the Plaintiffs in the litigation before the Respondents may preserve testimony and other evidence by way of deposition. Testimony of key witnesses will be lost unless it is perpetuated.
>
> "If the language of the decision, standing alone, should be construed as the final and immutable ruling of the Supreme Court, then it deprives the Plaintiffs of their lawful remedies. It bars them

from their day in Court. It withholds their rightful redress. It denies them the due process of law guaranteed by Article I, Section 12 of the Constitution of the State of Indiana and the 14th Amendment of the Constitution of the United States. It prohibits these Respondents from honoring those fundamental rights.

"If the quoted decision is not intended to run beyond the pendency of the Court of Appeals Cause No. 2-1275A-360, then the opinion and decision should be modified to state with unquestionable certainty whether the Plaintiffs are thus barred and their constitutional rights struck down or instead, are but temporarily halted in their proceedings in the forum of these Respondents."

The foregoing statements in the petition for rehearing constitute the first and only attempt of petitioners to assert the existence of any federal question in the Supreme Court of Indiana. No copy of the order denying the rehearing appears either in the body of the petition or the appendix thereto. The appendix includes a copy of a notice to petitioners from the Clerk of the Supreme Court of Indiana that their rehearing petition had been denied, and contains no reference to any accompanying opinion. There was, in fact, no such opinion.

The Supreme Court of Indiana has repeatedly held that the jurisdiction of the Indiana Court of Appeals to review and determine the validity of Commission orders is exclusive and that no circuit or superior court has such jurisdiction even when the appeal remedy has not been pursued.

State ex rel. Indianapolis Water Co. v. Boone Circuit Court, 261 Ind. 583, 307 N.E.2d 870. (1974).

Indianapolis Power & Light Co. v. Highland Realty, Inc., 253 Ind. 637, 256 N.E.2d 394 (1970).

State ex rel. Pub. Serv. Comm. v. Marion Circuit Court, 242 Ind. 145, 177 N.E.2d 397 (1961).

However, its decision with respect to issuance of the writ of prohibition involved here was based entirely on the second ground urged by respondents in the petition. The Indiana court stated (Pet. App., pp. A-2 and A-4):

"Relators support their petition by seeking application of the principle of law that the first of two courts acquiring jurisdiction of a subject matter in dispute between the same parties must be deemed to have the exclusive authority in the matter. *State ex rel. International Harvester Co. v. Allen Circuit Court*, (1976) ..... Ind. ....., 352 N.E.2d 487; *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1*, (1971) 256 Ind. 507, 269 N.E.2d 869; *State ex rel. Ferger v. Circuit Court*, (1949) 227 Ind. 212, 84 N.E.2d 585.

* * *

"The rule relied on by Relators is fully applicable here and the jurisdiction of the Court of Appeals must be held to be exclusive at this time so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts."

The petition for certiorari states (pp. 9, 10):

"Efforts by the present Petitioners to have the question of the Writ's duration clarified have been unavailing. Therefore, it must be assumed that the effect of this Writ is, in a temporal sense, permanent. The consequences of such permanence is to deprive the City of Rushville and the individual Plaintiffs in the contract action of their day in court to pursue whatever contract remedies may be available to them under Indiana law."

The "Efforts" referred to necessarily refer only to petitioners' assertion in their petition for rehearing that the language in the opinion of the Supreme Court of Indiana is conflicting and should be clarified "to state with unquestionable certainty whether the Plaintiffs are

thus barred and their constitutional rights struck down or instead, are but temporarily halted in their proceedings in the forum of these Respondents (present petitioners)."

The sole basis of petitioners' claim of denial of their constitutional rights, therefore, is the inference they insist must be drawn from the denial of their petition for rehearing without modification of the language which they claim created uncertainty, that regardless of the outcome of the proceeding pending in the Court of Appeals of Indiana, the Rushville plaintiffs are concluded as to all substantive merits of their claim by the judgment sought to be reviewed. As shown in the argument which follows there is no sound basis for an inference that the Supreme Court of Indiana either intended to, or did in fact, decide anything but an issue of state law.

ARGUMENT

The petition for certiorari contains nothing whatever with respect to the stage in the proceedings in which the federal question sought to be reviewed was raised, or the manner in which it was raised, as required by Rule 23(f) of the Rules of this Court. In fact, the first and only such claim by petitioners in the Supreme Court of Indiana was made in their petition for rehearing. That claim was, in effect, that a violation of a constitutional right would result unless the Supreme Court of Indiana modified or clarified the statement in its opinion "The writ heretofore granted in temporary form is now made permanent." Since the petition for rehearing was denied without opinion their effort to raise a federal question thereby, constitutional or otherwise, comes too late. *Rooker v. Fidelity Trust*, 261 U.S. 114, 117 (1923). It can scarcely be claimed that the statement in the opinion that the writ previously granted in temporary form was made permanent came as a surprise to petitioners here since the record shows that they were served with copies of the order which not only granted the temporary writ pending the further order of the court, but ordered petitioners to show cause why said writ should not be made permanent. Petitioners thus had a clear opportunity to assert in their return to said order to show cause that an order making said writ permanent would violate a federal right of petitioners.

There is no substantial basis for such claim in any event. In *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943), this Court said:

> "The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings, and conclusions of law."

The construction of the judgment that petitioners here seek to attribute to the Supreme Court of Indiana gives no effect whatever to the statement of that court:

> "* * * the jurisdiction of the Court of Appeals must be held to be exclusive at this time so that conflicting orders resolving the same issues will not emanate from the two courts thereby creating an unseemly confusion and controversy between those courts."

There is other language in the opinion which clearly established that petitioners are in error in their contention as to the effect of the court's statement that the temporary writ should be made permanent. The Supreme Court of Indiana also stated (Pet. App., pp. A-3 and A-4):

> "Relators support their petition by seeking application of the principle of law that the first of two courts acquiring jurisdiction of a subject matter in dispute between the same parties must be deemed to have the exclusive authority in the matter. * * *
>
> * * *
>
> "* * * The rule relied on by Relators is fully applicable here . . . ."

In support of the statement of the principle so held applicable, the opinion cites:

> *State ex rel. International Harvester Co. v. Allen Circuit Court* (1976), ... Ind. ....., 352 N.E.2d 487.
>
> *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1*, (1971), 256 Ind. 507, 269 N.E.2d 869.
>
> *State ex rel. Ferger v. Circuit Court* (1949), 227 Ind. 212, 84 N.E.2d 585.

In *State ex rel. International Harvester Co. v. Allen Circuit Court, supra*, the court said:

> "An unseemly conflict of jurisdiction exists between two courts of coordinate jurisdiction where both

> exert authority over cases between the same parties and involving the same subject matter and issues. * * * In such instances the jurisdiction of the court first acquiring such jurisdiction is deemed exclusive *until the case is finally disposed of on appeal or otherwise.*" (Page 489) (Emphasis added.)

Consequently, it is an inherent part of the rule which the Supreme Court of Indiana stated to be fully applicable in the proceeding sought to be reviewed here that the exclusive jurisdiction of the first acquiring court continues only until the case pending therein is fully disposed of on appeal or otherwise. That the Indiana court has never regarded the issuance of a final order that a temporary writ be made permanent as conflicting with the above principle is clear from *State ex rel. Ferger v. Circuit Court*, 227 Ind. 212, 84 N.E.2d 585 (1949), cited both in *State ex rel. International Harvester Co. v. Allen Circuit Court, supra*, and in the opinion involved here as stating the principle applicable. In the *Ferger* case the Supreme Court of Indiana stated (227 Ind. at p. 215):

> "* * * the court first having jurisdiction of the subject matter and the parties * * * has exclusive jurisdiction until the case in that court is finally disposed of on appeal or otherwise."

It also stated (pp. 214 and 217):

> "A temporary writ of prohibition has been heretofore issued.
>
> * * *
>
> "The temporary writ of prohibition heretofore granted is now by this court made permanent."

In *State ex rel. American Reclamation and Refining Co., Inc. v. Marion Superior Court, Room 1*, 256 Ind. 507, 269 N.E.2d 869 (1971), also cited both in the *International Harvester* case and the opinion in this case supporting the principle that the jurisdiction of the

court first acquiring jurisdiction is deemed to be exclusive until the case is finally disposed of on appeal or otherwise, the opinion shows (256 Ind. at p. 508) that the Supreme Court originally issued a temporary writ and thereafter ordered it made permanent.

It is clear from the above cases that the Supreme Court of Indiana has never considered that an order making permanent a temporary writ of prohibition against continued exercise of jurisdiction of the second acquiring court conflicts with the rule that the jurisdiction of a first acquiring court is exclusive until the case pending therein is finally disposed of on appeal or otherwise. Consequently, the only reasonable inference to be drawn from the failure of the Supreme Court of Indiana to modify its opinion on rehearing as demanded by petitioners herein is that it did not agree with their contention that its opinion was ambiguous and, therefore, saw no need for clarification. Cf. *Ellis v. Dixon*, 349 U.S. 458 at p. 462 (1955).

The principle held applicable by the Supreme Court of Indiana and its applicability to this case, including the determination as to which of the two courts first acquired jurisdiction, are, of course, purely matters of state law as to which the decision of said court is conclusive. However, an analysis of the basis for the issuance of the writ in this case and the practical effect of the termination of the appeal pending in the Court of Appeals fortify the obvious conclusion that petitioners have been deprived of no federal right of any character. It is clear that if both courts had been permitted to proceed, the possibility of conflicting orders in the two courts would have existed since both involve the validity of the Commission order. Under Indiana law even the possibility of such a conflict is a sufficient basis for the issuance of the writ. *State ex rel. Indpls. Ry. v. Superior Court*, 225 Ind. 301, 74 N.E.2d 912 (1947).

The validity of the Commission order is necessarily involved in said appeal and will finally be determined in that proceeding. If it should finally be held invalid by the Indiana Court of Appeals or the Supreme Court of Indiana on transfer, respondent utility would be obligated to refund to its customers, including the Rushville customers, the difference between the former rates and the higher rates collected in the interim to the extent not sustained on the appeal. IC 1971, 8-1-3-6.

In *Pub. Serv. Comm. v. City of Indianapolis* (1956), 235 Ind. 70, 131 N.E.2d 308, the court said:

> "It is established law in this state that there is an inherent right to appeal to the courts for relief against the violations of personal or property rights as a result of administrative action. The legislature may not absolutely deprive one of such relief or judicial review. However, where the statute provides for a procedure for such review or for a judicial remedy, it excludes any common law or equitable procedure to the extent such statutory provisions are adequate in protecting and preserving such substantive rights guaranteed by the constitution, the statutes or general principles of law." (235 Ind. 83, 131 N.E.2d 313.)

Since the City of Rushville, as such, has sustained no damage by reason of the order, and its users would receive a refund of the increase collected to the extent not sustained on the rate order appeal, it would appear that in that event the statutory remedy would afford complete relief and exclude any other remedy in the Marion Circuit Court or elsewhere, not because of the order making the writ permanent, but because of the principle that the statutory provision for review excludes any common law or equitable procedure to the extent its provisions are adequate in protecting and preserving the substantive rights guaranteed by the Constitution, the statutes or general principles of law.

Even assuming that a technical breach of the contract could be claimed because the Rushville users would have been required to pay the higher rates even though the amounts are refunded, it does not follow that the contract could be rescinded, since neither Rushville nor its ratepayers would have sustained any loss. *Block v. West Palm Beach* (5th Cir.), 112 F.2d 949, 952, citing *Black on Rescission*, pages 881 and 850.

As to the claim of petitioners that there are issues in the Circuit Court proceeding not involved in the rate order appeal, there is no basis upon any reasonable interpretation of the order making the temporary writ of prohibition permanent for petitioners' contention that it bars Rushville or the plaintiffs from asserting any issue they desire to litigate in the Marion Circuit Court whenever the cause pending in the Court of Appeals is finally terminated, subject to the legal limitation that the parties will be bound as to all matters adjudicated in the proceeding in the Court of Appeals.

Petitioners' basic error lies in their assumption that their petition for rehearing required the Supreme Court of Indiana either to modify its opinion, or assent by implication to petitioners' charge that the effect of the writ is to deprive the City of Rushville and the individual plaintiffs in the Marion Circuit Court of their day in court. The proceeding for the writ of prohibition involved no such issue either by any allegation of the petition therefore or any statement in any brief filed by these respondents in the Supreme Court of Indiana. By asserting violation of a federal right petitioners are, in effect, attempting to lift themselves by their bootstraps by asserting an interpretation of the judgment which is not only unsupported by the opinion of the Supreme Court of Indiana but in complete conflict with the intention clearly shown by its opinion language as well as by other decisions of that court cited in its opinion.

CONCLUSION

The petition for certiorari presents no federal question. Even if assumed to be sufficient for that purpose, the undisputed record shows that no claim of a federal question was ever timely made. In any event, there is no basis for petitioners' claim that the judgment making the writ permanent either deprives them of due process of law or violates any federal right they possess.

The petition for certiorari should be denied.

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